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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CINDY GUILLEN-GOMEZ, Plaintiff and Appellant, v. CITY OF BURBANK, Defendant and Respondent.	B242699 (Los Angeles County Super. Ct. No. BC414602)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Affirmed.

Law Offices of Rheuban & Gresen, Solomon E. Gresen and Steven M. Cischke for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt; City of Burbank, Carol A. Humiston; Mitchell Silberberg & Knupp, Julianne M. Scott and Lawrence A. Michaels and for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Cindy Guillen-Gomez (Guillen), an Hispanic female officer with the City of Burbank Police Department (BPD), appeals from the judgment entered on her employment-related claims against defendant and respondent City of Burbank (Burbank). In particular, Guillen challenges the trial court's rulings summarily adjudicating in Burbank's favor four claims under the California Fair Employment and Housing Act (FEHA, Gov. Code,[1] § 12940 et seq.) – harassment on the basis of her pregnancy, race- and sex-based discrimination, retaliation for complaints about such discrimination, and failure to prevent harassment and discrimination – as well her cause of action under the Public Safety Officers Procedural Bill of Rights Act (POBRA, § 3300 et seq.).

First, we conclude that the claim for harassment based on pregnancy was properly adjudicated in Burbank's favor because Guillen's proffered evidence of a few sporadic incidents did not demonstrate severe and pervasive harassment as required under FEHA. Second, we affirm the ruling on Guillen's discrimination claims based on disparate treatment and disparate impact theories. On appeal, she fails to identify an adverse employment action taken against her as a result of her race or gender, a failure that defeats her disparate treatment claim. Her disparate impact claim fails because her complaint did not adequately plead this theory, and even if it had, she presented no evidence that bears on her assertion that the BPD employed practices that resulted in the promotion of Hispanics and women in a rate that was disproportionate considering the available pool of eligible employees. Third, because there was no actionable harassment or discrimination, the claim for failure to prevent such harassment and discrimination also fails. Fourth, the trial

[1] All references to code sections are to the Government Code unless specified otherwise.

court properly granted Burbank's motion for summary adjudication as to Guillen's retaliation claim: of the two alleged adverse actions taken against her in response to her alleged protected activity, one occurred *before* she engaged in the activity, and the other was not alleged in her complaint, and she never moved to amend her complaint to add such an allegation. Finally, the trial court correctly ruled that Guillen's POBRA claim was barred due to her failure to file a government claim alleging a POBRA violation prior to filing her lawsuit.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Operative Complaint*

Plaintiffs Guillen, Omar Rodriguez, Steve Karagiosian, Elfego Rodriguez, and Jamal Childs, all BPD officers, filed suit against Burbank. The instant appeal concerns only Guillen's claims against Burbank, as the claims of the five plaintiffs were all adjudicated separately.

As to Guillen, the operative first amended complaint alleged claims under FEHA for: (1) disparate treatment based on race, gender, and pregnancy (§ 12940, subd. (a)); (2) wrongful harassment based on race, gender, and pregnancy (§ 12940, subds. (a), (d), (j)); (3) retaliation for protected activity (§ 12940, subd. (h)); (4) failure to accommodate pregnancy and pregnancy-related disability (§§ 12945, 12940, subds. (m), (n)); (5) failure to prevent harassment, discrimination and retaliation (§ 12940, subds. (j)(1), (k)); (6) violation of POBRA (§ 3300 et seq.); and (7) injunctive relief.

Guillen alleged the following facts. The BPD hired her in 2000, making her the first Hispanic female officer employed by the BPD. Throughout her tenure there, she has been called names such as "wetback," "beaner," "spic," "bitch," "whore," and "cunt." She also has heard and observed the use of racial epithets and other offensive language directed at suspects, the public, and other officers and

personnel at the BPD and Burbank. Guillen reported each of the incidents to her supervisors, but no corrective action was taken.

Immediately after she married, false rumors began circulating that she married because she was pregnant. In addition, a supervisory officer said in her presence that women had "no business being detectives." Another officer opined that "all the women in the [BPD] are worthless," and that women should be assigned to parks management because they were "useless." One officer told her on one occasion to be quiet "before I bend you over and f___ you in the ass." Guillen reported each incident, except where she believed it would have been futile to do so.

While on duty, Guillen was struck by a moving car in the course of pursuing a suspect on foot. Although the BPD's safety committee found that she was not at fault, the BPD gave her a reprimand for carelessness in discharging her duties. BPD promoted to detective a male officer who ranked eighth on the detective's examination. Although Guillen ranked fifth on the exam, BPD did not promote her.

Guillen learned that she was pregnant in October 2007, becoming the first pregnant police officer at the BPD in nearly 20 years. On November 26, 2007, her doctor placed her on "light duty." That day, during the morning roll call, a superior officer ordered her to reveal her pregnancy, and thereafter she was subjected to impermissible inquiries concerning her marital relationship and pregnancy. Other officers ridiculed her and made inappropriate comments, including saying, "Women just aren't what they used to be. I remember when they would wait until they were about 6 months pregnant before they even said anything." At one point, the BPD reprimanded her for being out of compliance with departmental policies due to her improper "height to weight ratio."

Guillen learned that the maternity leave policy had been changed after her pregnancy became public. As a result of the change in policy, she was forced to use her vacation and earned sick days as part of her maternity leave. When she was placed on bed rest, her request for disability leave was initially granted, but then was denied, until she finally was able to have her disability status restored after several weeks. After her daughter was born, Burbank sent her a draft settlement agreement that included a release of any legal claims she had against Burbank. Burbank pressured her to sign the agreement, and the Burbank Police Officers Association refused to assign her a lawyer to review the agreement, which she never signed.

When Guillen returned to work after her maternity leave, the BPD did not give her a work schedule in advance as was typical, but instead required her to call in each day to learn where and when to report for duty. Because Guillen needed to schedule day care for her infant and plan for emergencies, this arrangement, which lasted for approximately two weeks, was extremely disruptive for her.

While Guillen was on maternity leave, Burbank and the BPD updated the computer systems and hardware in the police cruisers with a new system and hardware called Mobile Digital Technology (MDT). Although Guillen requested training on the MDT, the BPD failed to provide it, even though she used a police cruiser every day.

In or about January 2009, she applied for a position with the Newport Beach Police Department as a result of the discrimination, harassment, and retaliation she faced at the BPD. Although she initially passed the background check and polygraph test, she believes the process was delayed by the BPD in retaliation for her taking maternity leave, pursuing her disability claims, and asserting her lawful rights. In addition, Guillen learned that someone at the BPD told the Newport Beach Police background investigator that she was a "cancer" in the BPD, that she

was "bitter" and had "anger management" issues, and that she was happiest when she became angry. As of the date of the complaint, Guillen had not received the answer about her application.

On May 27, 2009, Guillen filed a complaint with the Department of Fair Employment and Housing (DFEH) and received a notice of case closure and right to sue letter on that date. She also filed a government claim form with Burbank, which was denied on July 10, 2009.

II. *Burbank's Motions for Summary Judgment and Summary Adjudication*

Burbank initially moved for summary judgment as to Guillen's claims, and alternatively sought summary adjudication as to 75 separate issues. Although the complaint alleged only seven causes of action, Burbank contended that numerous separate claims were bundled together under each cause of action, necessitating the numerous bases for summary adjudication. For instance, Guillen's first cause of action for discrimination included claims for discrimination based on ethnicity, gender discrimination, and discrimination based on pregnancy.

The trial court initially denied the motions for summary judgment and for summary adjudication, ruling that one of the issues Burbank sought to adjudicate did not dispose of an entire cause of action, as required by Code of Civil Procedure section 437c, subdivision (f). Burbank sought a writ of mandate directing the trial court to vacate its order and to consider Burbank's motions for summary adjudication on the merits, arguing that under *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, "a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Id.* at p. 1854-1855.)

We issued a writ ordering the trial court to either vacate the order denying the motion for summary adjudication and enter a new order setting a hearing on the motion for consideration of the merits, or in the alternative, to show cause why a peremptory writ of mandate ordering the court to do so should not issue on the ground that certain of the issues identified in Burbank's separate statement, specifically Issue Nos. 7-8, 15-16, 23-24, 31-34, 44, 54, 64-66, and 67-75, could properly be considered on a motion for summary adjudication.

The trial court complied with the order, vacating its earlier order denying the motion for summary adjudication, and issued a new ruling that decided on the merits the specific issues we identified in our alternative writ as suitable for summary adjudication. In that subsequent ruling, the trial court denied the motion for summary judgment, and granted the motion for summary adjudication as to some issues but denied it as to others.

III. *Summary of Trial Court's Rulings on Motions for Summary Adjudication*

A. *Claims Surviving Summary Adjudication*

The trial court denied the motion for summary adjudication with respect to the claim for pregnancy discrimination (Issue Nos. 7, 8, and 67), the claim for retaliation based on pregnancy (Issue Nos. 15 and 16), and the claim for failure to prevent pregnancy discrimination or retaliation based on complaints of pregnancy discrimination (Issue Nos. 31-33). The court found that Guillen identified as triable issues the question whether Burbank's failure to provide access to and training on the MDT computer system constituted an adverse employment action, and whether she was reprimanded because of her pregnancy. The trial court also denied the motion as to the claims for harassment based on ethnicity and/or gender (Issue Nos. 65, 66, 68) and failure to prevent such harassment (Issue No. 71).

Finally, the trial court denied the motion directed at the request for injunctive relief (Issue No. 75).

A jury trial was held on the claims as to which the motions for summary adjudication were denied. The trial court granted Burbank's motion for a nonsuit as to the causes of action for racial and gender harassment and failure to prevent such harassment.

The jury deliberated regarding the cause of action for pregnancy discrimination, and based on its finding that Guillen had not suffered an adverse employment action, rendered a defense verdict on that claim. The jury similarly found for Burbank on Guillen's claim for retaliation based on her complaints regarding pregnancy discrimination. Although the record on appeal does not include verdicts on the claim for failure to prevent pregnancy discrimination and failure to prevent retaliation based on complaints of pregnancy discrimination, those claims necessarily failed along with the predicate discrimination and retaliation claims (as is discussed below in section III of the discussion).

B. *Claims Summarily Adjudicated*

1. *Harassment Based on Pregnancy and Failure to Prevent Such Harassment*

The trial court granted the motion for summary adjudication as to the claim for harassment based on pregnancy (Issue No. 33), finding that the admissible evidence showed only conduct that was too occasional, sporadic and isolated to constitute unlawful harassment. Likewise, the court summarily adjudicated the claim for failure to prevent harassment based on pregnancy (Issue No. 34).

2. *Discrimination Based on Ethnicity/Gender and Failure to Prevent Discrimination*

The court granted the motion for summary adjudication with respect to the claim for discrimination based on ethnicity and/or gender (Issue No. 44), finding that Burbank proffered evidence of legitimate business purposes for each of the alleged adverse employment actions, and Guillen failed to present evidence from which to infer a discriminatory motive. The trial court also found that Guillen could not rely on a disparate impact theory, finding that she had not pled such a theory in her complaint, and even if she had, she failed to point to the particular aspect of the BPD's promotions process tied to a disproportionate impact on minorities or women. Further, Guillen failed to present statistical evidence to support her contention.

The trial court further granted the motion for summary adjudication as to the claim for failure to prevent race- and sex-based discrimination (Issue No. 64).

3. *Retaliation Based on Ethnicity/Gender*

The trial court also granted the motion as to the claim for retaliation for complaining about race- and sex-based discrimination (Issue No. 54), relying on the same reasons for granting the motion as to the discrimination claim.[2]

4. *POBRA Claim*

The trial court dismissed the sixth cause of action under POBRA because Guillen failed to file a claim under the Government Claims Act (Issue Nos. 72, 74).

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[2] The court also granted the motion for summary adjudication as to the cause of action for failure to accommodate her pregnancy (Issue No. 24), as well as the claim for failure to prevent retaliation (Issue No. 64), but Guillen does not challenge those rulings on appeal and thus we do not discuss them further.

IV. *Scope of Issues on Appeal*

Guillen timely appealed from the judgment, but only as to the issues decided on summary adjudication, and not those decided against her at trial, including by the grant of nonsuits and jury verdicts.

DISCUSSION

I. *Hostile Work Environment Claim (Issue No. 33)*

We begin with Guillen's second cause of action, which alleged harassment based on pregnancy, ethnicity, and gender. The trial court granted Burbank's motion for summary adjudication as to her claim of harassment based on pregnancy, but denied the motion as to her claim for harassment based on ethnicity and/or gender, before ultimately granting Burbank's motion for a nonsuit as to that latter claim. Guillen appealed only the grant of summary adjudication as to the claim of harassment based on pregnancy, and not the trial court's grant of a nonsuit on the remaining harassment claim. Therefore, although Guillen's opening brief also discusses the evidence with respect to the claim for harassment based on ethnicity and gender, we limit our discussion to the evidence that bears on the claim for harassment based on pregnancy.

We review a trial court's summary adjudication decision de novo and determine independently whether the record supports the trial court's ruling that a claim fails as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*); *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951.) Here, we conclude that Guillen's pregnancy harassment claim fails because there is no triable issue that Burbank engaged in harassing behavior within the meaning of FEHA.

Section 12940, subdivision (j)(1) makes it unlawful "[f]or an employer . . . or any other person, because of . . . sex . . . to harass an employee." For purposes of this subdivision, harassment because of sex includes harassment based on pregnancy and childbirth.[3] (§ 12940, subd. (j)(4)(C).) A claim of hostile work environment sexual harassment requires a showing that the employee was subjected to comments and/or conduct that were (1) unwelcome, (2) because of sex, and (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 (*Lyle*).) "[C]ourts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Id.* at p. 283.) "Although annoying or 'merely offensive' comments in the workplace are not actionable, conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful, even if it does not cause psychological injury to the plaintiff." (*Ibid.*) "[I]t is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim." (*Id.* at p. 280.)

Guillen identified four instances of alleged harassment relating to her pregnancy. After reviewing the parties' evidentiary showings with respect to these

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[3] Guillen does not contend that the trial court erred in separately considering the claim for pregnancy-related harassment and the claim for non-pregnancy-related gender harassment. In fact, at the later trial, the court treated pregnancy and non-pregnancy gender harassment as "the same," and, according to Burbank, permitted evidence of pregnancy-related harassment to be admitted to support the non-pregnancy gender harassment claim. Because the full trial transcripts are not part of the record on appeal, we cannot verify the accuracy of that representation.

incidents, discussed below, we conclude the trial court properly granted summary adjudication as to the claim for harassment based on pregnancy.

A. *Roll Call Incident*

Guillen's complaint alleges that she was harassed based on her pregnancy when Sergeant Matthew Ferguson ordered her to reveal her pregnancy to the entire department during morning roll call.

In its motion for summary adjudication, Burbank argued that there was no evidence that Guillen was ordered to reveal her pregnancy during roll call. Burbank relied on Guillen's deposition testimony and Sergeant Ferguson's declaration regarding the events at the roll call in question.

Guillen testified that on November 26, 2007, her doctor put her on light duty due to her pregnancy. That day, Guillen attended roll call. Sergeant Ferguson, who was leading roll call, asked her in front of the other officers why she was not wearing her gun belt. Guillen said she would explain later, but Sergeant Ferguson told her that they were "down people in patrol and everybody needed to suit up and go." Guillen again stated that she would explain the circumstances to him later, but he said he needed to know right then. She responded that she had found out she was pregnant, and he replied, "Oh." When asked what knowledge she had about whether Sergeant Ferguson knew she was pregnant at the time he was questioning her, Guillen testified that it was her understanding that there was going to be an email sent about her pregnancy, but she did not know whether Ferguson had received that email yet.

Burbank also relied on a declaration from Sergeant Ferguson, in which he stated that when he asked Guillen at roll call why she was not fully dressed for duty, he did not know that she was pregnant or that she had been placed on light duty. He stated that his motivation for asking the question was to find out why she

was not fully dressed for duty, as officers are required to be fully dressed at roll call.

Burbank thus argued that Sergeant Ferguson did not know that Guillen was pregnant when he asked her during roll call why she was not wearing her gun belt, and thus he did not order her to reveal her pregnancy. Further, Guillen did not *have* to reveal that she was pregnant in response to his question, and instead could have answered that she had been placed on light duty.

In response to Burbank's showing, Guillen does not proffer any evidence from which a rational juror could infer that Sergeant Ferguson knew she was pregnant when he demanded to know why she was not wearing her gun belt. Without any evidence that he knew she was pregnant when he demanded to know why she was not wearing her gun belt, his demand could not be deemed harassment based on her pregnancy. (*Lyle, supra,* 38 Cal.4th at pp. 279-280; cf. *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1145 [no FEHA discrimination claim based on pregnancy "in the absence of evidence the employer knew the employee was pregnant"].)

B. *Weight Gain Comment*

Guillen alleged in her complaint that she was admonished about her weight while she was pregnant. Burbank proffered Guillen's deposition testimony about the comment, made by Chief Tim Stehr, that she had better "not gain too much weight" because she needed to come back to work. Guillen testified that it was her understanding that when the chief made this statement to her, he was expressing concern that she maintain her eligibility to work, and she testified she had no reason to doubt that he sincerely wanted her to stay on the job. According to Burbank, the chief's comment did not constitute harassment because it was motivated by his concern that she remain eligible to work.

In opposition, Guillen proffered her deposition testimony with more detail about the comment by Chief Stehr. She testified that the chief was present during a conversation she was having with Juli Scott, an assistant Burbank city attorney, who mentioned that during one of her pregnancies she had gained 50 pounds. The chief turned to Guillen and said, "You better not because you have to come back to work." Ms. Scott smacked the chief on his chest and told him his comment was inappropriate. Guillen was offended by this comment.

Guillen presents no evidence to dispute that the chief's motivation in warning her not to gain too much weight was that he wanted to make sure she was eligible to come back to work after her pregnancy. Because it is undisputed that the chief's motivation was not due to some personal or mean-spirited motive, the comment about Guillen's weight cannot be deemed "harassment." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645-646 ["'[H]arassment consists of . . . conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.'"].)

C. *Lazy Comment*

With respect to the allegation in the complaint that Guillen was ridiculed based on her pregnancy, Burbank relied on Guillen's testimony at her deposition that she could only remember one incident where someone ridiculed her for that reason. Guillen testified that a coworker, Edie Hartwick, told her that Sergeant Kelly Frank called her lazy because she did not take a particular traffic accident report but rather requested that another officer be assigned to do it. Hartwick told her that Sergeant Frank also criticized the uniform that Guillen was wearing, which consisted of a polo shirt and black maternity pants. In a declaration submitted in support of the summary judgment motion, Sergeant Frank acknowledged that he commented to Officer Hartwick that "Guillen is lazy [because] she should have

taken the [traffic accident] report herself," and as part of the same conversation he said something to the effect of, "Why is Guillen wearing a utility uniform?" He stated that he believed a polo shirt was too informal to be worn at the front counter, where officers interacted with the public. He stated that neither comment had anything to do with Guillen's gender or the fact that she was pregnant.

In opposition, Guillen proffered her deposition testimony that, according to Hartwick, Sergeant Frank's comments that Guillen was lazy and out of uniform were linked to other comments to the effect that she was not doing anything at the counter while she was pregnant. However, the trial court properly excluded this deposition testimony as based on hearsay. The only admissible evidence regarding the incident is from Sergeant Frank's declaration, which states that his comments had nothing to do with the fact that Guillen was pregnant. Moreover, even if we were to infer that the comments about her laziness and informal dress were made on the basis of her pregnancy, they do not rise to the level of harassment because, even considered in concert with the other alleged harassing conduct discussed below, the comments cannot be deemed so severe or pervasive as to create an abusive work environment for Guillen. (*Lyle, supra,* 38 Cal.4th at p. 279.)

D. *"Aren't What They Used to Be" Comment*

Guillen's complaint further alleges that she was subjected to the harassing comment that "[w]omen just aren't what they used to be. I remember when they would wait until they were about 6 months pregnant before they even said anything." Burbank proffered Guillen's deposition testimony that she did not remember who made this comment. Burbank argued that this comment by an unnamed officer was insufficient to constitute harassment, even considered with the other alleged harassing conduct.

In response, Guillen offered her declaration stating that after reviewing her deposition transcript, she was able to remember that Officer Thor Merich was the person who made the disparaging comment, and that he made it on December 13, 2007, at approximately 9:30 a.m. The trial court excluded Guillen's belated recollection of the details regarding the comment, based on the principle that a party cannot avoid summary judgment by submitting a declaration that contradicts his or her own prior deposition testimony. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120.) On appeal, Guillen challenges this evidentiary ruling, arguing that Guillen's declaration did not contradict her deposition testimony; rather, she was later able to remember something she could not recall at the time of her deposition.

Assuming the trial court erred, the details in Guillen's declaration are not sufficient to create a triable factual issue as to whether she was subject to an abusive work environment, even considered in concert with Guillen's evidence of other alleged harassing comments. We therefore affirm the adjudication of the claim for harassment based on pregnancy.

II. *Racial and Gender Discrimination (Issue No. 34)*

A. *Disparate Treatment Claim*

As to Guillen's claim for race- and gender-based disparate treatment in violation of FEHA, we conclude that the trial court correctly granted Burbank's motion for summary adjudication.

Section 12940, subdivision (a) prohibits employers from discriminating against an employee on the basis of race, color, national origin, or sex, among other protected categories, "in compensation or in [the] terms, conditions, or privileges of employment." (§ 12940, subd. (a).) To make out a prima facie case of discrimination, "[g]enerally, the plaintiff must provide evidence that (1) he was

a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz, supra*, 24 Cal.4th at p. 355.)

To prevail on a motion for summary adjudication on a discrimination claim brought under FEHA, a defendant employer initially has the burden to show either that the plaintiff could not establish one of the elements of the FEHA claim, or that there was a legitimate, nondiscriminatory reason for the adverse employment action. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1247.) If the employer meets this burden, it is entitled to summary judgment unless the plaintiff produces admissible evidence that raises a triable issue of fact material to the employer's showing. (*Guz, supra*, 24 Cal.4th at p. 357; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1005.)

In determining whether these burdens have been met, we view the evidence in the light most favorable to the nonmoving party, liberally construing his evidence while strictly scrutinizing the moving party's evidence. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) We will affirm a summary judgment if it is correct on any ground that the parties had an adequate opportunity to address in the trial court. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.) Although we independently review the grant of summary judgment, our review is limited to assessing the propriety of summary judgment in light of the contentions raised in an appellant's opening brief. (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1124 (*Food Safety*).)

As discussed below, as a matter of law, the alleged adverse employment actions that Guillen raises on appeal do not satisfy the standards required to make

out a prima facie case of disparate treatment. Thus, we affirm the grant of the summary adjudication motion on this claim.

1. *Alleged Adverse Employment Actions*

"[T]o be actionable, an employer's adverse conduct must materially affect the terms and conditions of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051, fn. 9 (*Yanowitz*).) "[T]he determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Id.* at p. 1052.) "[T]he phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Id.* at p. 1054.) The protections against discrimination in the workplace therefore are "not limited to adverse employment actions that impose an economic detriment or inflict a tangible psychological injury upon an employee." (*Id.* at p. 1052.) Rather, FEHA "protects an employee against unlawful discrimination with respect [to] the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id.* at pp. 1053-1054.) "[T]here is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries." (*Id.* at p. 1055.) Thus, "it is appropriate to consider plaintiff's allegations collectively under a totality-of-the circumstances approach." (*Id.* at p. 1052, fn. 11.)

In *Yanowitz*, the court found that the plaintiff had suffered adverse employment activity where "[m]onths of unwarranted and public criticism of a

previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining [the] manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory did more than inconvenience [the plaintiff]. Such actions, which for purposes of this discussion we must assume were unjustified and were meant to punish [the plaintiff] . . . , placed her career in jeopardy. Indeed, [the manager] so much as told [her] that unless there were immediate changes, her career . . . was over. Actions that threaten to derail an employee's career are objectively adverse." (*Yanowitz, supra*, 36 Cal.4th at p. 1060.)

On appeal, Guillen argues that the BPD took a number of adverse employment actions against her because of her gender and pregnancy. However, because of the way the claims were litigated and adjudicated in this case, the adverse actions allegedly taken against her as a result of her *pregnancy* are not fairly considered in connection with her claim for gender-based disparate treatment. This is so because, at the summary judgment phase, the issues of gender discrimination and pregnancy discrimination were considered separately.[4] The trial court summarily adjudicated the claim for discrimination based on ethnicity and gender, while it denied the motion for summary adjudication on the claim for pregnancy discrimination. That pregnancy discrimination claim went to trial and resulted in a defense verdict based on the jury's finding that Guillen did not demonstrate that she suffered an adverse employment action.

Thus, the following alleged adverse actions, which pertain to Guillen's pregnancy and which were presented as evidence at trial in support of her claim for pregnancy discrimination, are not properly considered here in connection with the

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[4] Guillen makes no argument that the trial court erred in separately considering claims for pregnancy discrimination and non-pregnancy gender discrimination.

summary adjudication of her claim for discrimination based on ethnicity and gender: (1) changes in policy during her pregnancy and maternity leaves, allegedly resulting in the loss of four weeks' pay; (2) an alleged reprimand Guillen received while on maternity leave for her failure to comply with the required height to weight ratio;[5] and (3) the denial of access to the new MDT computer system and failure to provide training on the system that had been offered while she was on pregnancy leave.

The two other alleged adverse employment actions that Guillen raises on appeal are that the BPD subjected Guillen to a hostile work environment and refused to provide her with a set work schedule following her return from a high-risk birth. The trial court granted Burbank's motion for a nonsuit on the claim for hostile work environment relating to ethnicity and gender, and Guillen does not appeal from that ruling. Further, as discussed above, we conclude that the acts of alleged harassment based on Guillen's pregnancy did not establish a hostile work environment as a matter of law. (See Section I, *supra*.) Thus, Guillen cannot rely on the existence of a "hostile work environment" as an adverse employment action.

As to the allegation that she was not provided a fixed work schedule upon her return to work following her maternity leave, and instead for two weeks had to call in each day to learn when to report for duty, Guillen makes no showing that this scheduling issue adversely and materially affected her job performance or opportunity for advancement. (*Yanowitz, supra*, 36 Cal.4th 1028 at pp. 1053-1054.) Rather, she describes the scheduling issue as disruptive and a hardship, because it made it very challenging to arrange for child care during this two-week

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[5] Although the trial court found at the summary judgment stage that the policy change and alleged reprimand did not constitute adverse employment actions, evidence of these events was still introduced at trial. The jury found they did not amount to adverse employment actions.

period. Such temporary inconveniences, however, cannot be considered material changes in the terms of her employment so as to cause employment injury.

On appeal, Guillen does not refer to any of the alleged adverse employment actions that the trial court actually considered in deciding to adjudicate the discrimination claim in favor of Burbank, including: (1) the BPD's failure to promote her to detective; (2) the reprimand it gave her for carelessness when she ran behind a police car that was backing up in a parking lot; (3) the BPD's failure to assign her to the Special Enforcement Detail; or (4) the fact that someone at the BPD gave a negative employment reference about her in connection with her application for a position at the Newport Beach Police Department. Our review of the propriety of summary judgment is circumscribed by the contentions Guillen has raised in her opening brief. (*Food Safety*, *supra*, 209 Cal.App.4th at p. 1124.) Even after Burbank pointed out in its responding brief that Guillen had not raised these alleged adverse actions, Guillen failed to discuss them in her reply brief. Thus, we deem Guillen to have abandoned her contentions regarding those alleged adverse actions. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [appellants forfeit contentions of error regarding summary adjudication of a cause of action by failing to raise the contentions in their appellate briefs].)

Since Guillen failed to make any credible argument regarding an arguable adverse employment action taken against her because of her ethnicity or gender, we need not reach the questions whether Burbank proffered evidence of non-discriminatory reasons for any such actions, or whether Guillen proffered evidence tending to show that Burbank's stated reasons are pretextual. We affirm the summary adjudication of the claim for disparate treatment based on ethnicity and gender.

B. *Disparate Impact Claim*

Guillen contends that the trial court erred in summarily adjudicating her claim that Burbank employed facially-neutral practices that had a disparate impact on women and Hispanics at the BPD. We disagree.

"'To prevail on a theory of disparate impact, the employee must show that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on certain employees because of their membership in a protected group.' [Citations]" (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 817.)

"Statistical proof is indispensable in a disparate impact case: '"The plaintiff must begin by identifying the specific employment practice that is challenged."' '"Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."' [Citation.]" (*Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1428.)

Burbank's motion for summary judgment did not address a disparate impact theory of discrimination. However, in opposing the summary judgment motion, Guillen relied on a disparate impact theory as well as a disparate treatment theory. Guillen articulated the following as her disparate impact theory: that the BPD's "facially neutral employment practice of applying and testing for promotions and other advancement had a disproportionately adverse impact on the Hispanic-American and/or female officers working for the BPD." She contends that her complaint stated a disparate impact claim in alleging as follows: "The discriminatory practices included . . . [r]efusing to promote each Plaintiff in accordance with each Plaintiff's demonstrated abilities as more fully described

above. Instead, the Burbank PD Defendants had a policy, practice and/or procedure which made it more difficult, if not impossible, for minorities, women and gays, among others, to obtain promotions, regardless of their competence. This includes, without limitation, the Burbank PD Defendants' failure to promote a single African-American police officer above the rank of 'officer' in the entire history of the Burbank PD."

A plaintiff must separately plead disparate impact and disparate treatment claims. (*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 895.) Where a plaintiff pleads only disparate treatment in his or her complaint, and does not put the defendant on notice of an intention to pursue a disparate impact theory (such as by propounding discovery requests for statistical information relevant to a disparate impact theory), the trial court properly precludes the plaintiff from pursuing a disparate impact claim at trial. (*Ibid.*) "After having focused on intentional discrimination in their complaint and during discovery, the employees cannot turn around and surprise the company at the summary judgment stage on the theory that an allegation of disparate treatment in the complaint is sufficient to encompass a disparate impact theory of liability." (*Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271,1292-1293.)

Guillen's complaint did not adequately state a separate claim for disparate impact in alleging that "the Burbank PD Defendants had a policy, practice and/or procedure which made it more difficult, if not impossible, for minorities, women and gays, among others, to obtain promotions, regardless of their competence." Read in the context of the other allegations in the complaint, this allegation reasonably is understood to refer to intentionally discriminatory policies, practices or procedures. Nowhere does the complaint allude to any facially neutral policy or practice that had a disparate impact on the Hispanics or women in the BPD. The allegation in the complaint that the BPD employed a common policy, practice or

procedure that led to the denial of promotions for minorities, women, and gays, follows from the fact that the complaint was brought on behalf of five different plaintiffs alleging various forms of discrimination. (See *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 378-379 [class action plaintiffs pursuing a disparate treatment theory alleged that employer engaged in a "pattern or practice" of systematic discrimination toward class]; *Bacon v. Honda of America Mfg., Inc.* (6th Cir. 2004) 370 F.3d 565, 575 ["pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment"].) Moreover, the record does not demonstrate that Guillen ever served discovery requests to support a disparate impact theory, or otherwise put Burbank on notice, prior to filing her opposition to summary judgment, of her intent to pursue such a theory.

Even assuming the complaint did state a disparate impact claim, Guillen's evidence submitted in opposition to the summary judgment motion did not tend to show a disparate impact on Hispanics or women as a result of the BPD's "facially neutral employment practice of applying and testing for promotions and other advancement," the employment practice that Guillen purports to challenge. Guillen proffered statistical evidence from the year 2000 comparing the percentage of Hispanic officers at the BPD (10 percent) versus at the Los Angeles Police Department (33 percent), the Los Angeles Sheriff's Department (26 percent) and the Pasadena Police Department (30 percent). Further, she proffered evidence that only five percent of the officers on the BPD were women, compared to 18 percent at the Los Angeles Police Department, and 14 percent at both the Los Angeles Sheriff's Department and the Pasadena Police Department. Guillen contends that these statistics constitute evidence of a "gross statistical disparity" which alone may constitute "prima facie proof of a pattern or practice of discrimination," or, at a minimum, create a triable factual issue.

There are a number of deficiencies with respect to Guillen's arguments based on this evidence, but we discuss here only the most obvious. Although Guillen challenges the BPD's employment practices disproportionately affecting Hispanics' and women's rates of "promotions and other advancement," her statistical evidence shows only the number of Hispanics and women *employed* in the year 2000. Here, evidence demonstrates nothing regarding the BPD's practice relating to *promotions*. Guillen has presented no evidence that the BPD relied on a practice that resulted in the promotion of Hispanics and females members in a proportion smaller than in the actual pool of eligible employees. As such, the trial court properly adjudicated the disparate impact claim in Burbank's favor. (See *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 650.)

III. *Failure to Prevent Harassment Based on Pregnancy (Issue No. 34)*

Guillen also contests the dismissal of her claim for failure to take reasonable steps to prevent harassment based on her pregnancy and failure to prevent race- and sex-based discrimination.

Section 12940, subdivision (j)(1), provides in part that "[a]n entity shall take all reasonable steps to prevent harassment from occurring," and subdivision (k) states that "[i]t is an unlawful employment practice . . . [f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." However, no such cause of action may be maintained "unless actionable misconduct occurred." (*Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880; see *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1316 ["[T]here can be no claim for failure to take reasonable steps necessary to prevent sexual harassment when an essential element of sexual harassment liability has not been established."].) Here, Guillen failed to proffer evidence that actionable harassment or discrimination occurred, and thus it follows that the trial

court correctly granted the motion for summary adjudication on her cause of action for failure to prevent harassment based on pregnancy and discrimination based on race and gender.

IV. *Retaliation Claim (Issue No. 54)*

We turn now to Guillen's claim for retaliation based on her complaints about race- and (non-pregnancy) sex-based discrimination. FEHA prohibits an employer from retaliating against an employee for engaging in activity protected under FEHA, i.e., "oppos[ing] any practices forbidden under this part" or filing a complaint, testifying, or assisting in any proceeding "under this part." (§ 12940, subd. (h); see *Yanowitz supra,* 36 Cal.4th at p. 1042.) "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz, supra,* 36 Cal.4th at p. 1042; see *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 298.)

On appeal, Guillen identifies the filing of her DFEH complaint on May 27, 2009, as her purported protected activity.[6] Her opening appellate brief lists two adverse employment actions by the BPD that she contends were in retaliation for her filing the DFEH complaint: (1) providing a negative employment reference

[6] The filing of a DFEH claim can constitute protected activity for purposes of a FEHA retaliation claim. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386.)

about her to the Newport Beach Police Department; and (2) removing her from her Parks Officer position.[7]

We need not address the general question whether giving a negative reference may be considered an adverse employment activity under FEHA; because of their timing, the derogatory remarks alleged to have been made by a BPD representative to the Newport Beach Police Department could not constitute an act of retaliation triggered by Guillen's DFEH complaint. Guillen submitted her DFEH complaint on May 27, 2009 and received a right-to-sue letter the same day. Her initial complaint in this lawsuit, filed the very next day, included allegations regarding the unfavorable employment reference. The negative reference obviously pre-dated her May 27, 2009 DFEH complaint, and thus could not have been given in retaliation for her having filed the DFEH complaint.

As for Guillen's removal from the Parks Officer position, she contends that this act occurred in June or July 2009, several months after she filed her lawsuit. However, she did not amend her complaint to add the allegation regarding this alleged adverse employment action. With respect to tort claims against a government entity, "[e]very fact essential to the existence of statutory liability must be pleaded." (*Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 809; see *Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.) Burbank's summary judgment motion properly addressed only the issues framed by the pleadings. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254 [moving party's burden on summary judgment was to negate only those theories of liability alleged in the complaint]; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253 (*Laabs*) ["[A] 'defendant moving for summary

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[7] As discussed above, our review of the propriety of the rulings on Burbank's motions for summary adjudication is framed by the contentions Guillen raises in her appellate brief. (*Food Safety, supra,* 209 Cal.App.4th at p. 1124.)

judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' [Citation.]"]; *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499.)

Contrary to Guillen's contention on appeal, it was not sufficient for Guillen to state in a footnote in her opposition to the motion for summary judgment that, should the trial court disagree that there were triable issues of fact, "in light of the substantial adverse action that has occurred since the filing of the FAC, this Court should treat this motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint." "If a party seeks to avoid summary judgment by going outside the pleadings, it is incumbent upon him to *move to amend* in a timely fashion. [Citations.] And in moving to amend, he must '[i]nclude a copy of the proposed amendment or amended pleading.' (Cal. Rules of Court, rule 3.1324(a)(1)." (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 664; see *Laabs, supra*, 163 Cal.App.4th at p. 1253.) Guillen makes no showing that she ever filed a motion for leave to amend or lodged a copy of the proposed amendment. Accordingly, she forfeited her right to rely on the purported adverse activity by the BPD of removing her from the Parks Officer position.

Accordingly, we affirm the trial court's ruling summarily adjudicating the retaliation claim in Burbank's favor.

I. *POBRA Claim (Issue Nos. 72 and 74)*

Guillen contends that the trial court erred in summarily adjudicating her cause of action under the POBRA (§ 3300 et seq.). Among other rights and protections for public safety officers, the statute prescribes particular protections for an officer facing punitive action (§§ 3303-3307), as well as clarifies officers'

privacy rights in certain situations, including when asked to take a lie detector test (§§ 3307.5-3309). The trial court found Guillen's POBRA cause of action was barred because she failed to submit a government claim alleging a POBRA violation. We agree, and affirm the summary adjudication of the POBRA claim in Burbank's favor.

The Government Claims Act provides that, with certain specified exceptions, all claims for money or damages against local public entities must be presented in accordance with the claim presentation statutes. (§ 905.) A public safety officer who files suit seeking an award of civil penalties under POBRA must have timely filed a claim with the public entity employer, or the POBRA cause of action is barred. (§§ 905, 911.2, 945.4; *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1150-1151 (*Lozada*).) "'"If a plaintiff relies on more than one theory of recovery against the [governmental agency], each cause of action must have been reflected in a timely claim."'" (*Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431, 434; see *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447 [section 945.4 "requires each cause of action to be presented by a claim complying with section 910"].)

In addition to injunctive relief, Guillen's complaint sought the award of civil penalties under POBRA. As such, she was required to file a government claim as a prerequisite to alleging a cause of action for POBRA violations. (*Lozada, supra,* 145 Cal.App.4th at pp. 1150-1151.) Although Guillen submitted a government claim to the City of Burbank on May 27, 2009, she admits that her government

claim makes no mention of a theory of recovery under POBRA.[8] In her opposition to Burbank's motion for summary judgment, Guillen argued only that she intended to file a *new* government tort claim alleging POBRA violations that had occurred since the filing of the first amended complaint.

On appeal, Guillen contends that the trial court "rejected" her offer to file a new government claim asserting POBRA violations since the filing of the first amended complaint. Aside from the fact that Guillen makes no showing that she ever attempted to submit a new government claim, she provides no authority for her contention that her POBRA claim could have been saved from summary adjudication by the filing of a "new" government claim. The trial court properly concluded that it should only rely on the allegations and evidence then before it. (See *Laabs, supra,* 163 Cal.App.4th at p. 1258, fn. 7 ["To allow an issue that has not been pled to be raised in opposition to a motion for summary judgment in the absence of an amended pleading, allows nothing more than a moving target."].) We affirm the trial court's summary adjudication of the POBRA claim.

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[8] Guillen's May 27, 2009 claim submitted to the City of Burbank alleged as follows: "Between January, 2000 and the present, and continuing, the City of Burbank and the Burbank Police Department, and their officers, employees, servants, and agents, without limitation, engaged in illegal and otherwise wrongful conduct including, without limitation, harassment and discrimination based on race, color, and national ancestry, among other things, and retaliation for opposing unlawful harassment and discrimination. This conduct created a hostile work environment in the City of Burbank and the Burbank Police Department. Further, the City of Burbank and the Burbank Police Department failed to take reasonable steps to prevent harassment, discrimination and retaliation from occurring, and also refused to take prompt remedial action upon learning of specific instances of harassment, discrimination and retaliation, among other things."

DISPOSITION

The judgment is affirmed. Burbank shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.